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IN THE
COURT OF APPEALS OF INDIANA

RICHARD L. BEACH II,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 36A05-0602-CV-87
	)	
KRISTINA A. (BEACH) TORMOEHLEN,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE JACKSON SUPERIOR COURT
The Honorable Douglas E. Van Winkle, Special Judge
Cause No. 36A05-0602-CV-87

August 24, 2006

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Richard L. Beach II, appeals the trial court's modification of the child support obligation of appellee-respondent Kristina A. (Beach) Tormoehlen as to the parties' minor daughter, G.B. Additionally, Richard claims that: (1) the trial court erred in refusing to impute income to Kristina above minimum wage; (2) Kristina's child support arrearage was improperly calculated; (3) the trial court erred in finding him in contempt; (4) the parties' settlement agreement (Agreement) was improperly modified with regard to various visitation arrangements; and (5) the trial court erred in determining that Kristina was not in contempt for her alleged failure to pay the proper amount of child support. Concluding that the trial court improperly calculated the amount of Kristina's child support arrearage, we reverse that portion of the judgment and remand this cause to the trial court for a re-calculation of the arrearage that Kristina owes. In all other respects, we affirm the trial court's judgment.

FACTS

G.B. was born on January 28, 2002, during the parties' marriage. On November 18, 2002, Richard petitioned for dissolution of the marriage, and the trial court entered a dissolution decree on February 24, 2003. In accordance with the Agreement that was approved by the trial court, Richard was granted custody of G.B. "and the right to determine her place of residence, education, religious training and health care." Appellant's App. p. 12. Kristina was ordered to pay $88 per week in child support and, absent any agreement to the contrary, Kristina was to exercise parenting time with G.B. "in accordance with the Indiana Parenting Time Guidelines as to weekly, holiday and summer." Id.

At the time of the dissolution, Kristina's child support payments were based on her earnings of $400 per week, Richard's weekly earnings of $819, and his childcare expenses of $138 per week. In May 2005, Kristina voluntarily terminated her employment at Rose Acre Farms. She had remarried and had given birth to another child. When Kristina again became pregnant, she "didn't see any sense in going back to work for five months." Tr. p. 24. Moreover, Kristina claimed that she had no intention to re-enter the work force because "it's almost cheaper for me to stay home." Id. at 25.

On May 9, 2005, Kristina filed a petition to modify child support, claiming a substantial and continuing change in circumstances that warranted a modification of her support obligation. At that time, Kristina began paying less than the previously-ordered child support. Thereafter, Richard filed a verified application for contempt against Kristina on July 19, 2005, claiming, among other things, that Kristina "willfully disobeyed [the] court's order in that she has failed to pay the proper amount of child support in accordance with the Agreement." Id. at 20.

Kristina then filed two contempt citations against Richard. The first, dated July 26, 2005, provided that:

> 3. The petitioner refused to allow Respondent visitation with the minor child scheduled for July 8th – 10th. The Petitioner advised the Respondent that he was taking the child on vacation. Further, the Petitioner did not advise Respondent or provide Respondent with an itinerary regarding the minor child's whereabouts and contact information while traveling as required in the Indiana Parenting Time Guidelines. As of this date, the Petitioner has not allowed the Respondent to schedule make up visitation missed due to the vacation.

Appellant's App. p. Kristina's petition of October 25, 2005, alleged that:

3. The Petitioner has refused to allow Respondent mid-week visitation with the minor child since June 22, 2005. The Petitioner did allow one (1) mid-week visitation on October 6, 2005 for 45 minutes. The Petitioner has allowed Respondent to make up a few mid-week visitations on the weekends, but it has been for insufficient amounts of time, with the maximum amount of time being 30 minutes. Further, the Petitioner has refused to allow the Respondent to make up at least two (2) weekend visitations that were missed due to Respondent's vacation schedule.

Id. at 27.

When the hearing on the petitions commenced on October 28, 2005, the evidence established that Kristina was currently living in Brownstown with her subsequent husband and their sixteen-month-old son. At that time, Kristina was approximately seven months pregnant with her third child and was experiencing complications with that pregnancy. Just prior to filing her petition for modification of child support, Kristina began paying approximately $25 per week in child support.

It was also established that Richard was earning $1007 per week at the Eli Lilly Company (Lilly). He incurred costs of $13.84 to $16.15 per week to insure G.B., and an additional $168.46 per week in work-related childcare expenses. Richard had also remarried and was living in Greenwood. Because of the geographic distance between Kristina and Richard, the parties would meet in Edinburgh, which allowed Kristina to exercise about one hour of parenting time with G.B. Kristina testified that she missed several mid-week visits, and the parties were unable to agree about the manner and method of make-up parenting time.

In the end, the trial court modified Kristina's child support obligation and imputed minimum wage to Kristina for purposes of child support. The trial court specifically found

that Kristina had not been able to work because of complications with her pregnancy, and calculated the modified child support to be $36 per week "retroactively to the date she filed her modification request." Appellant's App. p. 4. The trial court also determined that the modification resulted in an arrearage of $180, which, apparently, was calculated from May 2005—nearly eight months before the third child's birth. As for the contempt citations filed against Richard, the trial court found as follows:

> The petitioner is in indirect contempt of court for failing to provide the respondent with an intinerary or contact information during periods of vacation, for failing to allow the respondent make-up visits for one weekend and numerous mid-week visits. To remedy this problem the petitioner shall allow the respondent to make up the missed visits according to her own schedule, so long as this schedule is communicated to the petitioner at least one week in advance. As a further consequence for his indirect contempt of court the petitioner shall reimburse the respondent $300 attorney fees for filing and maintaining her Petitions for Contempt within 30 days from the date of the file-mark on this order.

Id. at 5. The trial court further ordered the parties to meet at a restaurant for purposes of delivering G.B. before and after visitation, and it determined that Richard was to allow Kristina uninterrupted telephone communications with G.B. and equal access to G.B.'s school and daycare records. Richard was also ordered to allow Kristina's mother to pick up G.B. for visitation purposes, and Richard was to provide Kristina with a minimum of twenty-four hours advance notice if a visitation had to be cancelled. Finally, the trial court determined that Kristina was not in contempt. Richard now appeals.[2]

DISCUSSION AND DECISION

[2] We draw Richard's attention to Ind. Appellate Rule 46(A)(10) which requires a trial court's appealed order to be included with an Appellant's brief. Richard failed to do so in this case.

I. Modification of Child Support—Imputing Minimum Wage Income to Kristina

Richard first claims that the trial court erred in not imputing income above minimum wage to Kristina for purposes of child support payments. Specifically, Richard contends that G.B. is being punished for the lack of child support as a result of Kristina's choice to stop working outside of the home after she remarried and became pregnant.

We first note that decisions regarding the modification of child support are reviewed for an abuse of discretion. Ind. Code § 31-14-11-8; Harris v. Harris, 800 N.E.2d 930, 937 (Ind. Ct. App. 2003). Such decisions should be reversed if they are deemed clearly erroneous. Harris, 800 N.E.2d at 937.

In accordance with Indiana Code section 31-14-11-8, child support awards may be modified only:

> (1) upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable; or
>
> (2) that:
>
> > (A) a party has been ordered to pay an amount in child support that differs by more than twenty percent (20%) from the amount that would be ordered by applying the child support guidelines; and
> >
> > (B) the order requested to be modified or revoked was issued at least twelve (12) months before the petition requesting modification was filed.

On appeal from a trial court's order modifying child support, we do not weigh the evidence or judge the credibility of the witnesses but, rather, consider only that evidence most favorable to the judgment, together with the reasonable inferences that can be drawn therefrom. Scoleri v. Scoleri, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). The petitioner

seeking modification of child support bears the burden of proving a substantial change in circumstances justifying modification. Id. The review of calculations of a parent's income for child support purposes should be reversed if clearly erroneous. Eppler v. Eppler, 837 N.E.2d 167, 173 (Ind. Ct. App. 2005), trans. denied.

Turning to our child support guidelines, we note that one of the objectives of the guidelines is "to establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support." Ind. Child Support Guidelines, Guideline 1, Preface. Additionally, Child Support Rule 2 provides that "there is a rebuttable presumption that the amount of the award that would result from the application of the . . . [g]uidelines is the correct amount of child support to be awarded."

When the evidence establishes that a parent has become voluntarily unemployed or underemployed, the trial court must calculate child support based upon a determination of the parent's potential income. Child Supp. G. 3(A)(3); Scoleri, 766 N.E.2d at 1218. By the same token, a child support order may not be used to force parents to work to their full potential or to make their career decisions based strictly upon the size of their potential paychecks. In re the Paternity of EMP, 722 N.E.2d 349, 351 (Ind. Ct. App. 2000). Although legitimate reasons may exist for a parent to take lower-paying employment other than to avoid his child support obligation, such is a matter entrusted to the trial court and will be reversed only for an abuse of discretion. Bojrab v. Bojrab, 810 N.E.2d 1008, 1015 (Ind. Ct. App. 2004). Thus, Child Support Rule 3 provides as follows: "if the trial court concludes from the evidence in a particular case that the amount of the award reached through

application of the guidelines would be unjust, the court should enter a written finding articulating the factual circumstances supporting that conclusion."

In this case, Kristina testified at the October 28, 2005, hearing that she had a sixteen-month-old child at home and was suffering from a "difficult pregnancy." Tr. p. 6, 19. She had been placed on medical leave from her employment because of the complications surrounding her then-current pregnancy, and she testified that she was unable to work at that time because of the pregnancy. Id. at 25. The evidence also demonstrated that once Kristina's disability insurance benefits ceased, she was required to take personal leave from her employment without pay. Id. She acknowledged that the costs of daycare for two small children would outweigh the financial benefits associated with outside employment. Id. at 21. Hence, Kristina ultimately terminated her employment so that she could care for the other two children, and she based her decision to remain at home with the children on the costs of daycare. Id. at 6.

In light of this testimony, Richard has made no showing that Kristina terminated her employment in order to avoid her child support obligation to G.B., or that she stopped working merely because of her remarriage. To be sure, Kristina faithfully paid her original child support obligation for nearly two years until she petitioned for modification of her child support payments. Id. at 22-23. In light of this evidence, it is apparent to us that the trial court determined that Kristina's decision as to whether or not to work within the home and care for her small children was not one that should subject her to financial hardship because of a child support order calculated three years earlier when the circumstances of her life were

much different. That said, we decline to find that the trial court's decision to impute income to Kristina in the amount of minimum wage for purposes of child support payments was an abuse of discretion. Thus, we affirm the trial court's judgment as to this issue.

II. Child Support Arrearage

Richard next claims that the trial court improperly calculated the amount of Kristina's child support arrearage. Specifically, Richard argues that the trial court improperly modified Kristina's support obligation "based on Kristina having two additional children and made said modification retroactive to May 2005—approximately eight months prior to the birth of her child." Appellant's Br. p. 5.

The Child Support Guidelines provide that "there should be an adjustment to Weekly Gross Income of parents who have natural or legally adopted children living in their household, and who were born or adopted subsequent to the prior support order." Child. Supp. G. 3(A)(4) (emphasis added). In essence, there is no provision for an adjustment to income for anticipated children or during the period of a pregnancy.

Here, the record shows that the trial court modified Kristina's support obligation effective May 9, 2005—nearly eight months prior to the time that she was actually entitled to the reduction in her income as set forth in the guidelines. Although Kristina's only argument in response to Richard's claims is that trial counsel "suggested to the trial court that Kristina should receive credit for her unborn child due to the proximity of Kristina's anticipated delivery date," appellee's br. p. 7, the record does not support such an assertion. Rather, Richard's trial counsel stated in closing argument that if a proper income was imputed to

Kristina, no modification was warranted—even giving her credit for two subsequently-born children. Tr. p. 62. In our view, such a statement cannot be construed as "consent" to give retroactive credit for a child six to seven months prior to his or her birth. As a result, we are compelled to conclude that the trial court's decision to calculate the child support arrearage from May 2005 on the basis that Kristina had two children at the time was error. Hence, we must remand this cause to the trial court so that it may recalculate the amount of Kristina's arrearage of her support obligation based on the one child that was living with her.

III. Contempt—Richard

Richard argues that the trial court erred in finding him in contempt for violating the Indiana Parenting Time Guidelines for willfully failing to provide an itinerary to Kristina during parenting time. Specifically, Richard maintains that such a finding was erroneous because the Agreement did not specifically adopt the Guidelines as to parenting time and there was no specification for missed parenting time or make-up visits.

To be punished for contempt of a court's order, there must be an order commanding the accused to do or refrain from doing something. Burrell v. Lewis, 743 N.E.2d 1207, 1213 (Ind. Ct. App. 2001). Likewise, a trial court must find that a party acted with willful disobedience before finding that party in contempt. Id. The determination of whether a party is in contempt of court is a matter within the trial court's discretion. In re the Paternity of P.E.M., 818 N.E.2d 32, 39 (Ind. Ct. App. 2004). A finding of contempt is left to the trial court's discretion, and we will reverse if the finding is against the logic and effect of the facts or circumstances or contrary to law. Commercial. Credit Counseling Serv. v. W.W.

Grainger, Inc., 840 N.E.2d 843, 852-53 (Ind. Ct. App. 2006).

We further note that the Parenting Time Guidelines "are applicable to all child custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody." Ind. Parenting Time Guidelines, Scope of Application 1. Moreover, these guidelines provide that "[a]ny deviation from [the] Guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case." Ind. Parenting Time Guidelines, Scope of Application 2.

In this case, Kristina directs us to Indiana Parenting Time Guideline I(A)5 in support of her position that Richard was in contempt of court. This guideline provides that

> For emergency notification purposes, whenever a child travels out of the area with either parent, one of the following shall be provided to the other parent: An itinerary of travel dates, destinations, and places where the child or the traveling parent can be reached, or the name and telephone number of an available third person who knows where the child or parent may be located.

First, we note that there is no suggestion in the Agreement that the Parenting Time Guidelines should not apply here. Moreover, there is no written explanation in the Agreement or incorporated into the Agreement as to why a deviation from the Guidelines was necessary. That said, the Guidelines are applicable, and we must determine whether the evidence was sufficient to support the finding of contempt against Richard.

At the hearing, Kristina testified that Richard informed her that he intended to take G.B. on vacation over the weekend on July 8 – 10, 2005. Tr. p. 17. Richard acknowledged that that he requested to have G.B. with him as it was a vacation weekend. Id. at 40. While

Richard later claimed that he planned to stay home with G.B., the evidence fails to show that he informed Kristina of that fact. Moreover, when Kristina missed parenting time with G.B., Richard refused to agree to any "make-up time" as contemplated by the guidelines. Tr. p. 7. In considering this evidence, the trial court could reasonably conclude that Richard had willfully disobeyed the trial court's order with respect to the visitation arrangement. As a result, we cannot say that the trial court abused its discretion in finding Richard in contempt.

IV. Modification of Settlement Agreement

In a related issue, Richard claims that the trial court improperly modified the Agreement with regard to parenting time. Specifically, Richard contends that the trial court's order regarding telephone access to G.B., access to G. B.'s school records, and who should be permitted to pick up G.B. from visitation, were issues that Kristina had not raised in her petition. Thus, Richard maintains that the trial court's orders regarding parenting time must be set aside because he had no advance notice of the proposed modification.

As Richard correctly observes, the relationship between a parent and his or her child is "a sacred and precious privilege." Fawcett v. Gooch, 708 N.E.2d 908, 910 (Ind. Ct. App. 1999). Hence, procedural due process must be provided to adequately protect the parties in matters involving child custody and parenting. Id. However, notwithstanding Richard's claims that he was not provided with notice of Kristina's intention to modify the provisions of the Agreement, the evidence shows that Kristina filed two verified petitions for contempt citations on July 26, 2005, and October 25, 2005. The petition filed on July 26 alleged that Kristina was entitled to visitation in accordance with the Guidelines, and that Richard was in

contempt for failing to provide her with information about G.B.'s whereabouts as required by the Guidelines. Appellant's App. p. 23. The October 25 petition requested that the trial court permit Kristina to make up the mid-week visitations that had been missed. Id. at 27. And the pick-up location and the fact that Richard refused to permit Kristina's mother to transport G.B. were among the issues involved in the contempt citations. Tr. p. 1, 8.

As noted above, Richard presented evidence with regard to these issues, and he had notice of the pending issues prior to the hearing. Moreover, Kristina only sought to have the provisions of the Parenting Time Guidelines enforced that were already in effect under the terms of the Agreement. To be sure, Richard has not alleged that Kristina requested any additional parenting time or changes with regard to G.B.'s custody. Although the trial court addressed the issue of telephone communication that Kristina may not have specifically raised in her verified petitions for contempt, Richard has made no showing as to how the trial court's decision to consider evidence on that issue might have prejudiced him. Even so, reasonable telephone communication for both parties during each other's respective parenting time is called for pursuant to Indiana Parenting Time Guideline I(A)(3).[3] Hence, Kristina was merely requesting the trial court to enforce the telephonic communication provision of the Parenting Time Guidelines.

In sum, Richard has made no showing that his fundamental rights were violated when

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[3] This Guideline provides that

> Both parents shall have reasonable phone access to their child at all times. Telephone communication with the child by either parent to the residence where the child is located

the trial court addressed various issues that Kristina may not have precisely raised in her petitions for contempt. To be sure, Richard addressed these issues at the hearing and presented his own evidence with regard to Kristina's claims. Hence, we reject Richard's contention that he was "blind sighted" by Kristina's claims that she allegedly presented for the first time at the hearing. Appellant's Br. p. 14.

V. Contempt—Kristina

Finally, Richard argues that the trial court erred in refusing to find Kristina in contempt of her support obligation. Specifically, Richard maintains that a contempt finding should have been issued against Kristina because she unilaterally reduced her child support payments absent a court order permitting her to do so.

We initially observe that a non-custodial parent may not unilaterally reduce a child support obligation. Rather, that parent must make payments as ordered unless and until the trial court modifies the child support order. Ogle v. Ogle, 769 N.E.2d 644, 648 (Ind. Ct. App. 2002). Further, "once funds have accrued to a child's benefit under a court order, the court may not annul them in a subsequent proceeding." Id. By the same token, a trial court may order support retroactive to when the petition to modify was filed, or any date thereafter. In re the Paternity of G.R.G., 829 N.E.2d 114, 120 (Ind. Ct. App. 2005).

While Richard cites to Ogle in support of his position that Kristina must be held in contempt, those circumstances are distinguishable from those that are presented here. In

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shall be conducted at reasonable hours, shall be of reasonable duration, and at reasonable intervals, without interference from the other parent.

Ogle, the non-custodial parent was obligated to pay education and non-educational support, and a judgment had been entered against him for an arrearage. Id. at 646. Ogle argued that he was entitled to credit toward his child support arrearage in the amount of the college expenses that he had paid. In the end, it was determined that Ogle could not receive a credit for college expenses toward an already established arrearage. In essence, it was apparent that Ogle was not attempting to modify support but to apply a credit of other educational expenses that he was obligated to pay toward his child support arrearage. Id. at 649. In particular, the majority view observed that:

> At no time did [the parents] petition to modify or terminate the then existing child support order. Thus, Jerry was obligated to pay [his daughter's] college expenses and make the support payments in the manner, amount, and at the times required by the Settlement Agreement, and as modified by the subsequent agreement. By failing to pay the non-educational support while [his daughter] was at college, Jerry unilaterally reduced his support obligation, which he is not permitted to do.

Id. at 649.[4]

Unlike the circumstances in Ogle, Kristina filed a petition for modification and she began to pay an amount that she reasonably believed was supported by her current income and subsequent children. Hence, Richard has made no showing that Kristina maliciously reduced her support or merely ignored the trial court's order to pay. Thus, we conclude that the trial court properly concluded that Kristina was not in contempt.

CONCLUSION

[4] The author of this opinion dissented and observed, among other things, that Ogle's payments of his daughter's educational expenses while ceasing to pay non-educational support did not amount to an

In light of our disposition of the issues above, we conclude that the trial court properly imputed income to Kristina at the prevailing minimum wage rate, but the trial court erred in basing Kristina's child support arrearage amount, in part, on a child that had not yet been born. We further find that the trial court properly found Richard in contempt and conclude that the trial court did not err in modifying the Agreement with respect to telephone communication with G.B., visitation arrangements, and access to G.B.'s school records. Finally, we conclude that the trial court properly determined that Kristina was not in contempt of the child support order.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to recalculate the amount of Kristina's child support arrearage.

MAY, J., concurs.

SULLIVAN, J., concurs with opinion.

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impermissible unilateral reduction in child support pursuant to the parties' settlement agreement. Ogle, 769 N.E.2d at 651, Baker, J. dissenting.

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	)	
Appellee-Respondent.	)	

SULLIVAN, Judge, concurring

I concur but write separately to state that I agree that the case before us is distinguishable from Ogle v. Ogle, 769 N.E.2d 644 (Ind. Ct. App. 2002), trans. denied.

Ogle straightforwardly held that a non-custodial parent may not unilaterally reduce court-ordered support. 769 N.E.2d at 648-49. The petitioner must seek and obtain a modification order from the court. Id. In the case before us, Kristina sought a modification but unilaterally reduced her payments before receiving a modification order. At first blush, therefore, it might appear that our decision here should be governed by Ogle.

However, the case we consider is the trial court's decision not to hold Kristina in contempt for her shortfall payments. The trial court did not unqualifiedly approve her

unilateral action but merely stated that she was not in contempt of the prior support order. That is a different consideration than was faced by the trial court in Ogle.

Subject to this observation, I concur.